No. 97-1709

Supreme Court, U.S.
FILED
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In The

# Supreme Court of the United States

October Term, 1997

KUMHO TIRE COMPANY, LTD., KUMHO U.S.A., INC., and HERCULES TIRE & RUBBER COMPANY, INC.,

*Petitioners,*

*vs.*

PATRICK CARMICHAEL, AN INDIVIDUAL AND FATHER AND NEXT OF KIN TO PATRICK CARMICHAEL, JR., A MINOR, LUZVIMINDA CARMICHAEL, AN INDIVIDUAL, MOTHER AND NEXT FRIEND OF CARINA HORN, A MINOR, AND ADMINISTRATRIX OF THE ESTATE OF JANICE HORN, CARINA HORN, A MINOR, LEONA CARMICHAEL, SHAMEELA CARMICHAEL, NATIMAH CARMICHAEL,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

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6 pp

## QUESTION PRESENTED

**Whether the Court of Appeals correctly held that Respondents' expert's opinions, which were based upon technical and specialized knowledge as opposed to his application of scientific principles and theories, should not be submitted to a *Daubert* analysis.**

## STATEMENT OF JURISDICTION

Respondents agree that this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) as is alleged in the Petition.

## STATEMENT OF THE CASE

Respondents generally agree to the statement of the case as set forth by the Petitioners. However, one important correction needs to be noted.

Petitioners claim that Respondents' mechanical engineering expert, Dennis Carlson, had never seen the subject tire made the basis of this suit prior to issuing his Rule 26 report. To the contrary, the evidence in this case reveals that Mr. Carlson reviewed several photographs of the subject tire which, in his opinion, showed evidence of a defect. He further reviewed a study conducted by Respondents' earlier expert, who had taken ill and was unable to participate in this case. After reviewing the photographs, as well as other evidence, Mr. Carlson issued a report stating that it was his opinion that the tire failed due to a manufacturing defect. Prior to his deposition, Mr. Carlson actually inspected the subject tire which confirmed his earlier opinions that in fact the tire was defective and unreasonably dangerous.

After the completion of discovery, Petitioners filed motions to exclude Carlson's testimony and for summary judgment. Respondents argued that the four *Daubert* factors should not be used in determining the admissibility of Carlton's testimony. In granting Petitioners' motion to exclude Carlson's testimony (and hence summary judgment), the District Court disagreed, and held that the four *Daubert* factors were controlling.

Respondents' timely appealed to the Eleventh Circuit Court of Appeals, who subsequently reversed the District Court's ruling. In reversing, the Court of Appeals held that Carlson's testimony was not scientific, but rather, was of a technical nature. Accordingly, the Court of Appeals ruled that the District erred in utilizing the four factors set forth in *Daubert* to exclude Carlson's testimony. Because the District Court's granting of summary judgment was premised upon its exclusion of Carlson's testimony, the Court of Appeals reversed the entry of summary judgment and remanded this case for further consideration in light of its opinion.

## REASONS FOR DENYING THE WRIT

To begin, this Court should scrutinize the question presented by the Petitioners. In its petition, Petitioners claim that the issue is whether the lower courts should utilize the four *Daubert* factors in determining whether to admit "an engineering expert's testimony." This question, however, begs the question of whether or not the testimony is scientific or technical in nature. If in fact the opinions proffered by an engineering expert are scientific, then of course the *Daubert* analysis applies. However, as the Eleventh Circuit Court of Appeals correctly held in this case, Carlson's testimony was not scientific in nature, but rather was of a technical nature. Accordingly, because it was of a technical nature, the four *Daubert* factors do not apply.

Petitioners would have this Court issue a blanket ruling that the four *Daubert* factors apply each and every time any type of expert testifies in a federal court proceeding. However, this Court clearly held that its opinion in *Daubert* was limited to "the scientific context." *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2795 n.8 (1993).



In effect, Petitioners want this Court to expand the "gatekeeper" function of trial judges to require persons from beekeepers, *Berry v. City of Detroit*, 25 F.3d 1342, 1349-50 (6th Cir. 1994), to auto mechanics, *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1453 (11th Cir. 1997), to fit within the proper "methodology." While many trial judges may relish the opportunity to exclude testimony from any "expert" who has not written a book, performed a statistical analysis, or joined a science club, *Daubert* should not be expanded to limit testimony such as referenced above.

On the other hand, there does exist a sharp conflict among the circuits as to whether the four *Daubert* factors are to be used in addressing the admissibility of non-scientific opinion testimony. While Respondents do not agree with the manner in which Petitioners have phrased the question, Respondents agree that this Court should decide the standard for admitting opinion testimony that is technical or otherwise based on specialized knowledge. The question is whether this case presents the proper vehicle to address this issue. Should this Court decide to grant the petition, Respondents would welcome the opportunity to address this issue.

## CONCLUSION

Respondents believe that the Court of Appeals correctly held that Carlson's testimony was technical in nature, and thus, not subject to a *Daubert* analysis. Since the Court of Appeals correctly decided the appeal, granting the Petition would not change the outcome of this case.

Nevertheless, Respondents agree that there exists a sharp conflict among the circuits as to whether lower courts should subject non-scientific opinion testimony to the four factors set forth in *Daubert*. To eliminate this conflict, Respondents would welcome the opportunity to brief this issue to the Court.

Respectfully submitted,

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